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IN THE

Supreme Court of the United States

October Term, 1971

No. 1029 71-1020

JOEL BERNARD REISMAN,

Petitioner,

against

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

On Petition for a Writ of Certiorari to the Court of Appeals of the State of New York

BRIEF FOR RESPONDENT IN OPPOSITION

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TABLE OF CONTENTS

	PAGE
Introduction	1
Opinion Below	2
Jurisdiction	2
Questions Presented	2
Statement of the Case	3
Argument	
Point One—The Court of Appeals properly ruled that the "fruit of the poisonous tree" doctrine was inapplicable to the case at bar and that Detective Tobin effected a lawful arrest and seizure	6
Point Two—Petitioner's concession in the state court that Dunkel's search was that of a private citizen and not subject to Fourth Amendment proscription precludes him from contending in this Court that Dunkel acted as an agent of the police	9
Point Three—The Court of Appeals applied the findings of fact to its decision in a manner completely consistent with the Constitution as reflected in the decisional law of this Court	11
Point Four—No constitutional issue arises from petitioner's contention that respondent failed to prove knowing possession	13
Conclusion	14

TABLE OF AUTHORITIES

Cases:	PAGE
Abrams v. United States, 250 U.S. 616 (1919)	13
Abt v. The Superior Court of Los Angeles County, 82 Cal. Rptr. 481	12
Burdeau v. McDowell, 256 U.S. 465 (1921)	9, 11, 12–13
Carroll v. United States, 267 U.S. 132 (1925)	8
Chimel v. California, 395 U.S. 752 (1969)	8, 9
Coolidge v. New Hampshire, 403 U.S. 443 (1971)	8, 9
Dewitt, B.R., Inc. v. Hall, 19 N.Y.2d 141 (1967)	12
Elkins v. United States, 364 U.S. 206 (1960)	11, 12, 13
Garner v. Louisiana, 368 U.S. 157 (1961)	13
Leary v. United States, 395 U.S. 6 (1969)	14
Riley v. New York Trust Co., 315 U.S. 343 (1942)	12
Schwartz v. Public Administrator, 24 N.Y. 2d 65 (1969)	12
Silverthorne Lumber Co. v. United States, 251 U.S. 385 (1919)	6, 7–8, 13
Texas & Pacific Railway Company v. Abilene Cotton Oil Co., 204 U.S. 426 (1906)	10, 11
Thompson v. Louisville, 362 U.S. 199 (1960)	13
United States v. Paroutian, 299 F.2d 486 (2d Cir. 1962)	7
United States v. Rabinowitz, 339 U.S. 56 (1950)	8
Whitely v. Warden, 401 U.S. 560 (1971)	13
Wong Sun v. United States, 371 U.S. 471 (1963)	6, 12, 13

PAGE

Statutes:

Former Code of Criminal Procedure (McKinney's Consol. Laws, Vol. 66, Sec. 177-11) 8
Revised Penal Law of New York:
Section 220.20 13
3 C.J.S. 323 10
28 U.S.C. 1257(3) 2
80 ALR 2d 1355-1376 13

Other Authorities:

United States Constitution:
Fourth Amendment 9, 11
Wolfson & Kurland, *Robertson & Kirkham Jurisdiction of the Supreme Court of the United States* (1951) 10

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BRIEF FOR RESPONDENT IN OPPOSITION

Introduction

This is a brief in behalf of respondent in opposition to a petition for a writ of *certiorari* to the highest court of the State of New York, the Court of Appeals.

Petitioner was convicted of the crime of Criminal Possession of a Dangerous Drug in the First Degree after a

trial before Mr. Justice Peter F. Farrell and a jury in the Supreme Court of the State of New York, County of Queens. Judgment of conviction was rendered on May 13, 1969, and petitioner was sentenced to a term of imprisonment not to exceed five years.

Opinion Below

The intermediate appellate tribunal below affirmed the conviction on October 19, 1970, without opinion. The memorandum of that court—the Supreme Court of the State of New York, Appellate Division, Second Department—is reported at 35 A.D. 2d 281 (1970).

On November 18, 1971, the Court of Appeals of the State of New York, in an opinion by Judge Charles D. Breitel, unanimously affirmed the order of the Appellate Division. The opinion of the Court of Appeals (Appendix B of Petition) is reported at 29 N.Y. 2d 278 (1971). Judgment was entered on or about December 1, 1971.

Jurisdiction

The jurisdiction of this Court to review, by way of *certiorari*, is invoked under 28 U.S.C. §1257(2).

Questions Presented

1. Whether the doctrine of "fruit of the poisonous tree" is applicable when the information that predicated the seizure originated from a private search but was confirmed by an illegal police search?

2. Whether a conclusion of fact based upon the concession of a litigant which forms the basis for a decision in the state court may be now challenged by petitioner and presented for review by this Court?

3. Whether the suppression of evidence in one state requires suppression by a second state despite the untainted and wholly lawful search by the officer in the second state?

4. Whether the evidence at bar was so lacking so as to deprive petitioner of his rights to a fair trial and to due process of law?

Statement of the Case

On February 11, 1968 at 11:00 P.M. Detective Michael Tobin of the Narcotics Bureau of the New York City Police Department received a telephone call from Sgt. Fred McKnight of the Los Angeles Police Department (T 24, 26).* McKnight had previously given Tobin reliable information on numerous occasions, information that had ultimately resulted in convictions (H 5).** McKnight told him that two cartons were coming from Los Angeles to New York. He said that the larger carton was filled with 23 bricks of marijuana and that he had seized the contents of the other carton and replaced it with sand (H 42). The material McKnight seized was also marijuana (H 43).

Tobin was told by McKnight that an airline employee had originally found the marijuana. Neither man made

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*"T" numerical references are to Trial Minutes.

**"H" numerical references are to Suppression Hearing.

any mention of a search warrant (H 44). McKnight also told him the name of the consignee, the flight number, the arrival time and the number on the air bill (H 48-49).

The following morning Detective Tobin went to American Airlines Building No. 82 at John F. Kennedy Airport, arriving there at 6:30 A.M. (H 7, T 27). He had no warrant (H 28). An airline employee loaned him an American Airlines coat (T 90-91). At 7:00 A.M., two cartons arrived at the airport that conformed with the information received from McKnight (H 7). The packages were consigned to George Carlton, care of Tanker Reisman (H 7). They were marked "Hold for pick up" (H 37, T 27).

Detective Tobin remained in the area so that the packages never left his custody, but he made no effort to open the packages until after the arrest (H 8). He was, however, able to detect an odor of marijuana emanating from one of the boxes (H 29-30). At 11 P.M. that night petitioner approached Tobin and said he wanted to claim some packages (H 9).

Tobin accompanied petitioner to the freight agent and heard him say "My name is Tanker Reisman. I came to claim some packages". Petitioner then signed the airbill (H 10). Petitioner gave Tobin a copy of the airbill and as they approached the area, petitioner pointed to the packages that belonged to him (T 34). Detective Tobin verified this by comparing the airbill with the packages and then suggested that petitioner get his car and bring it to the bay. Petitioner said that he would carry the package. Detective Tobin then returned the airbill to the petitioner and the two men each picked up a package (T 36).

As they left the area the co-defendant Di Erano approached them and offered to carry Tobin's package (T 37). Detective Tobin knew nothing about Di Erano at this time. Di Erano insisted on taking the package and finally pulled it from Tobin's grasp (T 37). It turned out that Di Erano's package was filled with sand (T 148).

Tobin observed petitioner and Di Erano walk to their car, a 1965 maroon Pontiac. As petitioner and Di Erano were putting the cartons in the car, Detective Tobin placed them under arrest and seized the cartons (H 15). A search of the petitioner turned up various papers and a telephone book (T 40-74). The phone book contained information that conformed to the airbill and made no mention of marijuana (T.77, 134).

When Tobin entered the door of the car he was able to smell a distinct odor of marijuana smoke. Subsequently, he discovered a manila envelope containing a small quantity of marijuana (T 41). He also discovered some cigarette paper (T 60).

Tobin brought the defendants back to the building and opened the packages in their presence. The larger package contained 23 bricks of marijuana wrapped in tinfoil (H 34, T 100). The second package contained a plastic bag filled with sand (T 52). A chemist testified that the larger carton contained a total of 45 pounds and ½ ounce of marijuana and that the envelope recovered from the car contained ¼ of an ounce plus 27 grains of marijuana (T 278-279, 282).

Petitioner was convicted of criminal possession of a dangerous drug in the first degree and acquitted of criminal possession of a dangerous drug in the second degree. Di Erano was acquitted of all charges.

ARGUMENT

POINT ONE

The Court of Appeals properly ruled that the "fruit of the poisonous tree" doctrine was inapplicable to the case at bar and that Detective Tobin effected a lawful arrest and seizure.

The petitioner argued in the New York courts that Detective Tobin's actions were rendered unlawful by the illegal action taken by the Los Angeles Police Department. He contended that all of the evidence unearthed by Tobin is inadmissible as being "fruit of the poisonous tree" in that he acted solely as a result of information unlawfully obtained by the California search. *Wong Sun* v. *United States*, 371 U.S. 471 (1963).

The Court of Appeals rejected that argument. They held that Dunkel's original discovery constituted independent and untainted information upon which Tobin could proceed, and under those circumstances, his actions should not be impaired by the illegal act of the California police. *Silverthorne Lumber Co.* v. *United States*, 251 U.S. 385 (1919) [Petition, pp. B-4, B-5].

Petitioner contends in this Court that the Court of Appeals predicated its decisions upon the hypothetical circumstances "that Detective Tobin could have made the arrest and seizure in New York had he received information directly from Richard Dunkel * * *" (Petition, p. 11). This, the petitioner urges, was error on the part of the Court of Appeals, because what actually did happen was

that Tobin in fact received the information, not from Dunkel, but from the California police, and that the "test must be one of actualities not possibilities." *United States* v. *Paroutian*, 299 F. 2d 486, 489 (2d Cir., 1962) [Petition, p. 11].

Petitioner misconstrues the basis of the Court of Appeals' decision. Judge Breitel took pains to point out that when the California police called Detective Tobin, he was told that "We have already got some out. The airline employee found it" (Petition, B-2). He went on to base his decision not, as the petitioner suggests, upon the hypothetical of what Tobin might have done "had he received information directly from Richard Dunkel" (Petition, p. 11), but rather upon the fact that Tobin was not only told about the California search by the police, but that the marijuana had been discovered by the airline employee. It was this latter fact which gave Tobin "independent untainted information" upon which he could lawfully proceed (Petition, B-4, B-5).

This decision was clearly consistent with the standards established by Justice Holmes in *Silverthorne*, *supra*, wherein he wrote:

> The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the court but that it shall not be used at all. Of course this does not mean that the facts thus obtained become sacred and inaccessible. If *knowledge* of them is gained from an independent source they may be proved like any others, but the knowledge gained by the government's own wrong cannot be used * * *. *Silverthorne Lumber*

Co. v. *United States*, 251 U.S. 385, 392 (1919). (Emphasis added.)

In the case at bar, it is irrefutable that no new knowledge was gained by the illegal police search. Rather, it merely confirmed the discovery made initially and *independently* by Dunkel. Hence in no way can it be said that Tobin was taking advantage of *knowledge* illegally obtained and as such the "fruit of the tree" doctrine is improperly applied to the instant circumstances.

Petitioner also contends that, irrespective of the impact of the California search, Tobin's subsequent response thereto was unlawful because he failed to obtain a warrant (Petition, pp. 13-14). This contention has no merit. Detective Tobin had the right to arrest petitioner without a warrant because he had probable cause to believe he had committed a felony [former Code of Criminal Procedure, (McKinney's Consol. Laws, Vol. 66, Sec. 177 [1]); *Carroll* v. *United States*, 267 U.S. 132, 156 (1925)]. Having made a lawful arrest, he then had a right to make a search contemporaneous thereto and to seize the contraband that the search produced. *Carroll, supra*, 267 U.S. 132 (1925); *United States* v. *Rabinowitz*, 339 U.S. 56 (1950); *Chimel* v. *California*, 395 U.S. 752 (1969).

Notwithstanding petitioner's suggestion, nothing in *Coolidge* v. *New Hampshire*, 403 U.S. 443 (1971), detracts from the legality of Tobin's actions. First, Mr. Justice Stewart pointed out that the seizure in *Coolidge* did not fall within the accepted bounds of search contemporaneous with a lawful arrest and as such there was no need for the

Court to grapple directly with the constitutional issues that that doctrine presented [*Coolidge, supra,* 403 U.S. 443, 91 S. Ct. 2022, 2032-2033 (1971)]. Secondly, the Court at several junctures pointed out that what was being said in *Coolidge* was not inconsistent with *Chimel, supra,* 395 U.S. 752 (1969), and that *Chimel* is still the law (cf., *Coolidge, supra,* 403 U.S. 443, 9 S.Ct. 2022, 2033 n. 11, 2038 n. 24, 2046). What the *Coolidge* case did do was hold that "the police must obtain a warrant when they intend to seize an object outside the scope of a valid search incident to arrest," *supra,* 403 U.S. 443, 91 S.Ct. 2022, 2047 (1971). Tobin's seizure was well within the bounds of *Chimel, supra,* 395 U.S. 752 (1969) and hence not subject to the warrant requirement.

POINT TWO

Petitioner's concession in the state court that Dunkel's search was that of a private citizen and not subject to Fourth Amendment proscription precludes him from contending in this Court that Dunkel acted as an agent of the police.

Petitioner contends that the initial intrusion in California made by Richard Dunkel was itself subject to the proscriptions of the Fourth Amendment in that Dunkel allegedly acted as an agent for the Los Angeles Police Department. (Petition, pp. 12-13). This contention is being raised for the very first time in this Court. Moreover, petitioner specifically conceded the fact that Dunkel's search was a private search within the meaning of *Burdeau* v. *McDowell,* 256 U.S. 465 (1921), at every preceding stage

of the litigation.* Respondent submits that petitioner's contention in this regard must be disregarded by this Court.

Whether an agency relationship exists between parties is clearly a question of fact (3 C.J.S. 323). The decision of the trial court depended in part upon the conclusion that Dunkel's acts were those of a private citizen. That conclusion was preceded by an express concession of that issue by defendant-petitioner in his supporting memorandum of law. The decisions of the Appellate Division and the Court of Appeals were similarly dependent thereon. This Court is therefore precluded from reviewing the question.

> "Where the state trial court reaches a conclusion from the facts found, and owing to the concession of counsel on both sides that such conclusions were correct, the state appellate court decides the case on that hypothesis, it is not open to the parties to seek a review by the Supreme Court of the facts under a contention that they do not justify the conclusion reached." [Wolfson & Kurland, *Robertson & Kirkham Jurisdiction of the Supreme Court of the United States* (1951)].

It was on this basis that this Court refused to review the propriety of a conclusion of fact made by the trial court in *Texas & Pacific Railway Company* v. *Abilene Cotton Oil Co.*, 204 U.S. 426, 434-435 (1906). In that case, the appellate briefs conceded the propriety of the trial court's conclusion as to a question of fact, and confined the issue on appeal in the state court to the correctness of the con-

* Supreme Court of the State of New York, Criminal Term—see defendant-petitioner's Memorandum of Law in Support of a Motion to Suppress, pp. 17-18; Supreme Court of the State of New York, Appellate Division—see appellant-petitioner's brief, p. 30; Court of Appeals of the State of New York—see appellant-petitioner's brief, p. 19.

clusions of law derived therefrom. When an attack was made on the very issue of fact conceded to in the state courts, this Court held that such an attack was unavailable to the appellant.

Since in the case at bar the history of the litigation with respect to the issue of agency is precisely analogous to the circumstances in the *Texas & Pacific Railway, supra,* 204 U.S. 426, 434-435 (1906) case, respondent respectfully submits that petitioner is bound by that decision and is precluded from raising this issue. For the purposes of this petition, Dunkel's actions must be considered those of a private citizen and hence not subject to Fourth Amendment proscription. *Burdeau* v. *McDowell,* 256 U.S. 465 (1921).

POINT THREE

The Court of Appeals applied the findings of fact to its decision in a manner completely consistent with the Constitution as reflected in the decisional law of this Court.

The petitioner contends that the Court of Appeals' decision in this case made inroads into existing Supreme Court standards of search and seizure. He suggests that the decision implies that the police departments of sister states are now free to conspire to circumvent the Fourth Amendment by making illegal searches and then allowing another state to use the fruits thereof, in direct conflict with the spirit of *Elkins* v. *United States,* 364 U.S. 206 (1960). He further suggests that the New York courts failed to give full faith and credit to the California Supreme Court's

decision in *Abt* v. *The Superior Court of Los Angeles County*, 82 Cal. Rptr. 481 (Petition, pp. 8-10).

The issue of full faith and credit may be disposed of summarily. Full faith and credit cannot be accorded to a judgment of one state court unless that state court had jurisdiction over the parties to the litigation in the second state. Since neither petitioner nor respondent herein were subject to the jurisdiction of the California courts in *Abt, supra*, 82 Cal. Rptr. 481, full faith and credit is inapplicable to the case at bar. *Riley* v. *New York Trust Co.*, 315 U.S. 343, 348-349 (1942); *B.R. Dewitt, Inc.* v. *Hall*, 19 N.Y. 2d 141 (1967); *Schwartz* v. *Public Administrator*, 24 N.Y. 2d 65 (1969). Moreover, as Judge Breitel noted, to the extent that the issues were identical, to wit: whether the police search in California was lawful, the New York courts made a determination consistent with the holding in California.

Petitioner's contention that the Court of Appeals' decision effectively subverted the intent of *Elkins* v. *United States*, 364 U.S. 206 (1960), has no merit. Indeed, respondent submits that the court below did nothing more but apply the standards set forth by this Court in *Silverthorne* v. *United States*, 251 U.S. 385, 392 (1919), to the circumstances at bar in concluding that Dunkel's findings constituted knowledge obtained independently of the legal infirmity. Such a holding is materially distinguishable from either *Elkins, supra*, 364 U.S. 206, or *Wong Sun* v. *United States*, 371 U.S. 471 (1963), since unlike those cases, the New York courts ruled that the New York police were acting upon information received as a result of a private search and, as such, the exclusionary bar is inapplicable. *Burdeau* v.

McDowell, 256 U.S. 465 (1921). It also renders irrelevant the recent Supreme Court decision *Whitely* v. *Warden*, 401 U.S. 560 (1971), since that case, like *Elkins, supra,* and *Wong Sun, supra,* also turns on the accountability of one police officer for the acts of another police officer (Petition, pp. 9-10). Thus the decision of the Court of Appeals was completely consistent with both the Constitution in its own right and the Constitution as reflected in the decisional law of this Court.

POINT FOUR

No constitutional issue arises from petitioner's contention that respondent failed to prove knowing possession.

Section 220.20 of the Revised Penal Law of New York makes it a crime to *knowingly* possess a dangerous drug.

Petitioner contends that his rights to a fair trial and due process of law were violated because the jury apparently inferred knowing possession from the circumstances surrounding petitioner's actual possession (Petition, p. 15). Respondent submits that this question is one of sufficiency of evidence. Such an issue does not rise to constitutional proportions when there is some evidence before the jury fairly tending to sustain the verdict. *Abrams* v. *United States*, 250 U.S. 616 (1919); *Thompson* v. *Louisville*, 362 U.S. 199 (1960); *Garner* v. *Louisiana*, 368 U.S. 157 (1961); see, also, 80 ALR 2d, 1355-1376.

In the case at bar, the petitioner was caught red-handed with a package containing 45 pounds of marijuana. The package was addressed in care of the petitioner. At the

time of the arrest, a small quantity of marijuana was found in the car and the car smelled of burning marijuana. In addition, petitioner was able to pick out the two packages as his own from a distance of ten feet. Clearly, this constituted ample evidence from which the jury could infer knowledgeable possession. In any event, it obviously surpasses the constitutional standards alluded to above.

Finally, *Leary* v. *United States*, 395 U.S. 6 (1969), relied upon by petitioner, is clearly irrelevant (Petition, p. 15). *Leary, supra*, 395 U.S. 6 (1969), deals with the constitutionality of a statutory presumption. No statutory presumption is at issue in this case—rather, it is merely the sufficiency of the evidence which the petitioner challenges. On that issue we submit that Judge Breitel's discussion of the proof of knowledge is dispositive (Petition, pp. B-6, B-8).

Conclusion

The petition for a writ of certiorari should be denied in all respects.

Respectfully submitted,

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